

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>AL'S HUB CAPS, INC.</b>	:	DETERMINATION
		DTA NO. 816981
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1993 through August 31, 1997.	:	

---

Petitioner, Al's Hub Caps. Inc., 490 Jericho Turnpike, Mineola, New York 11501, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1993 through August 31, 1997.

On May 3, 2001, the Division of Taxation by its representative, Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel), filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the grounds that petitioner signed a Consent and thereby waived any right to a hearing with the Division of Tax Appeals. The Division of Taxation submitted a Notice of Motion and the Affidavit of Christina L. Seifert, Esq., with attachments, in support of its motion. Pursuant to section 3000.5(d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioner had until June 4, 2001 to respond to the motion, which date commenced the 90-day period for issuance of this determination. Petitioner did not respond to the motion.

Upon review of the pleadings and motion papers submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation is entitled to an order granting summary determination in its favor on the ground that petitioner has waived its right to a hearing with the Division of Tax Appeals.

***FINDINGS OF FACT***

1. On or about July 16, 1998, a Notice of Determination (Notice number L-015366651) was issued to petitioner asserting additional sales and use taxes due, plus penalty and interest, for the period September 1, 1993 through August 31, 1997.<sup>1</sup>

2. On October 19, 1998, petitioner filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS") that references Notice number L-015366651-3.

3. By Conciliation Order Dismissing Request (CMS No. 171289) dated November 13, 1998, BCMS denied petitioner's Request for a Conciliation Conference on the ground that the request was not filed within 90 days of the date of the issuance of the Notice of Determination.

4. On February 12, 1999, petitioner filed a petition with the Division of Tax Appeals in protest of the Conciliation Order Dismissing Request relating to Notice number L-015366651.

5. The files of the Division of Tax Appeals include a corporate power of attorney running from Al's Hub Caps, Inc. to Robert Muroff. The corporate power of attorney was signed by petitioner's president, Alex Eisenberg, on October 15, 1996. The power of attorney appointed

---

<sup>1</sup> The record does not include a copy of the Notice of Determination.

Mr. Muroff to appear and represent Al's Hub Caps, Inc. before the Department of Taxation and Finance in connection with a proceeding involving sales taxes and all taxes from 1993 to present. The Division of Taxation's Office of Counsel supplied the Division of Tax Appeals with a copy of the corporate power of attorney by facsimile on June 22, 1999.

6. By a memorandum to Frank Landers, Supervisor of the Petition Intake, Review & Exception Unit, dated June 14, 1999, BCMS informed the Division of Tax Appeals that the Conciliation Order Dismissing Request (CMS No. 171289) had been rescinded and notification sent to petitioner.

7. By letter to Mr. Muroff, dated June 21, 1999, Mr. Landers requested that petitioner execute a Stipulation for Discontinuance of Proceedings upon Recission of Conciliation Order Dismissing a Request. The stipulation explains that withdrawal of the petition would discontinue the proceeding in the Division of Tax Appeals and allow the matter to be resolved in BCMS without jeopardizing petitioner's right to file a petition within 90 days of the issuance of a Conciliation Order, if petitioner chose to do so.

8. On October 19, 1999, Mr. Muroff, as petitioner's representative, signed and filed with BCMS a Consent setting forth tax due in the amount of \$8,500.02, plus interest relating to Notice number L-015366651. According to the Consent, the penalty asserted in the Notice was canceled. This Consent contained the following language just above Mr. Muroff's signature: "I hereby agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the above notice."

### ***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

A party moving for summary determination must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn

reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. 20 NYCRR 4000.5(c) reads, in pertinent part, as follows:

(3) (i) After reviewing the testimony, evidence and comments, the conciliation conferee will serve on the requester a proposed resolution in the form of a consent. . . .

(ii) Where the proposal is acceptable to the requester, the requester shall have 15 days to execute the consent and agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the statutory notice.

C. The Division contends that it is entitled to summary determination in its favor because petitioner waived any right to a hearing before the Division of Tax Appeals when its representative signed the consent form. In support of its contention, the Division has submitted the Consent signed by Mr. Muroff. A corporate power of attorney executed by petitioner's president running in favor of Mr. Muroff and authorizing him to act on behalf of petitioner is part of the record. By signing the consent form, petitioner's authorized representative agreed to waive its right to a hearing with the Division of Tax Appeals concerning the Notice of Determination (Notice number L-015366651) dated July 16, 1998.

D. Petitioner did not respond to the Division's motion for summary determination; therefore, it is deemed to have admitted the facts asserted by the Division (*see, Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Accordingly, there are no material and triable issues of fact presented. Petitioner signed a Consent and thereby waived any right to a hearing with the Division of Tax Appeals. Therefore, the Division of Tax Appeals lacks jurisdiction over the petition.

E. The Division of Taxation's Motion for Summary Determination is granted and the petition of Al's Hub Caps, Inc. is hereby dismissed.

DATED: Troy, New York  
August 16, 2001

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE